

2.—Was he in possession and enjoyment of such right at any date within the 12 years immediately preceding the date of the suit ?

1866.  
June 23.  
S. A. No. 193  
of 1866.

3.—What was the loss sustained by plaintiff by the wrongful act of defendant in preventing the flow of water to plaintiff's lands in 1862 and 1863 ?

With regard to the loss in 1864, the plaintiff's right to recover will depend upon whether or not the special damage claimed had accrued (not whether plaintiff was acquainted with it or not, as suggested by the Civil Judge) at the time of the bringing of the suit. For an obstruction to a right to water a plaintiff would be entitled to at least nominal damages ; but an obstruction, such as that alleged in the present suit, would be a continuing injury giving rise to a fresh cause of action as fresh damage resulted from it. If the special damage alleged in 1864 had accrued at the time of the bringing of the suit, the plaintiff will be entitled to recover that also, if the first and second issues are found in his favor.

The costs hitherto will be costs of the suit.

APPELLATE JURISDICTION (a)

*Special Appeal No. 196 of 1866.*

SRI DANTULURI NÁRÁYANA GAJAPATI }  
RÁZU GÁRU..... } *Appellant.*

SURAPPA RÁZU and another, heirs of }  
DANTULURI TIMMA JAGAPATI RÁZU. } *Respondent.*

There is no foundation for the opinion that an Appellate Court has no authority to interfere with the discretion of the Lower Court as to costs.

To assess the defendant in a suit with the plaintiff's costs when plaintiff's suit is dismissed for want of any cause of action is irregular and unreasonable.

THIS was a special appeal from the decision of S. Venkátádry Náyudu, the Principal Sadr Amin of Rajahmundry, in Regular Appeal No. 63 of 1865, modifying the decree of the District Munsif of Cocanada, in Original Suit No. 39 of 1861.

1866.  
June 23.  
S. A. No. 196  
of 1866.

(a) Present Innes and Collett, J. J.

1866.  
 June 23.  
 S. A. No. 196  
 of 1866.

The suit was brought by the plaintiff's (special respondents) praying that 2nd and 3rd defendants might be deprived of the possession of the land made over to them by 1st defendant (widow of the plaintiff's brother), and that the same might lapse to them after the life-time of the 1st defendant.

The District Munsif dismissed the suit with costs.

The Principal Sadr Amin, admitting that the 1st defendant was free to alienate her property during her life, and that the plaintiffs could not interfere with such alienation, assessed the defendants with all costs.

*Sloan*, for the appellant, the 2nd defendant.

The Court delivered the following

JUDGMENT :—In this case the Principal Sadr Amin has found that the plaintiffs have no cause of action and has dismissed their claim.

In doing so, however, he not only declined to allow defendants their costs, but assessed them with the costs of plaintiffs.

2nd defendant appeals on the ground of costs.

The Sadr Court appear to have held in 1859, that the Court before which a suit comes in appeal has no authority to interfere with the discretion of the Lower Court as to costs. We think, however, that there is no foundation for this opinion.

On appeal, and we may add in special appeal, the whole judgment is before the Higher Appellate Court, and where the costs have been assessed in a manner clearly not warranted by the use of a sound discretion guided by judicial precedents, we think that this is such an error in law as authorises our interference in special appeal.

No doubt Section 187 of the Code gives the Courts a wide discretion in assessing costs, but, as observed by Lord Mansfield in *Wilkes' case*, "Discretion when applied to a Court of Justice means a sound discretion guided by Law.

“It must be governed by rule not by humour. It must  
 “not be arbitrary, vague and fanciful, but legal and  
 regular.”

1866.  
 June 23.  
 S. A. No. 196  
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To assess defendant with plaintiffs' costs when plaintiffs' suit is dismissed for want of any cause of action, is altogether irregular and unreasonable, and there is no precedent for such a mode of assessing costs.

We think also that, as plaintiffs' suit was dismissed for want of cause of action, defendant should, as usual, have been allowed his costs. The Principal Sadr Amin's view is that defendant's fraud led to the suit, but supposing defendant's conduct to have been fraudulent, it is quite clear that it did not, according to the Principal Sadr Amin's view, give a cause of action for the plaintiff's present suit which has been dismissed by him as brought without cause. This being so, we think that the Principal Sadr Amin's discretion in awarding costs was in this instance also not exercised according to Law.

We, therefore, modify the decision of the Principal Sadr Amin so far as it awards plaintiffs their costs from this defendant and disallows him his costs from plaintiffs.

Plaintiffs as against this defendant will discharge their own costs and those of the defendant, calculated on the amount of costs ordered to be paid by him by the Principal Sadr Amin.